No.

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# In the Supreme Court of the United States

OCTOBER TERM, 1976

76-979

**ARTHUR G. McKEE & COMPANY,**

*Petitioner,*

v.

**G.C.S., INC., I.S.C., INC., McJUNKIN CORPORATION, and the HON. DANIEL J. SNYDER, JR., United States District Judge for the Western District of Pennsylvania,**

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Arthur G. McKee & Company petitions that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered on October 28, 1976.

### OPINIONS BELOW AND IN COMPANION CASES

The judgment of the United States Court of Appeals for the Third Circuit is printed in Appendix 1. (App. 1-2). The opinions and orders of the United States District Court

for the Western District of Pennsylvania (Snyder, J.) dated March 22, 1976, June 18, 1976, and July 21, 1976 are printed in Appendices 2, 3, and 4, respectively. (App. 3-10, App. 11-14, and App. 15-16). The opinion and order of the United States District Court for the Northern District of Illinois in a companion case captioned *Arthur G. McKee & Co.* v. *G.C.S., Inc.*, is printed in Appendix 5. (App. 17-20). The opinion and order of the United States District Court for the Western District of Pennsylvania (Sorg, C. J.) in a companion case captioned *G.C.S., Inc.* v. *Arthur G. McKee & Co.* is printed in Appendix 6. (App. 21-25). The opinion and order of the Court of Common Pleas of Allegheny County, Pennsylvania in a companion case captioned *Honeywell, Inc.* v. *G.C.S., Inc., et al.* v. *Arthur G. McKee & Company* is printed in Appendix 7. (App. 26-28). None of these opinions is reported.

## JURISDICTION

The Third Circuit's judgment was entered on October 28, 1976. (App. 1). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

The questions presented for review by this Court are:

1. Whether, after this Court's decision in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), a federal court may refuse to enforce a contractual forum selection clause in a third-party action brought under F.R.Civ.P. 14(a), on the ground that the issue arises in the context of a third-party action, even though that clause has been expressly held reasonable and enforceable as between the parties to the third-party action by other federal courts in earlier-filed related cases.



2. Whether, under this Court's decisions in *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) and *Shanferoke Coal & Supply Corp.* v. *Westchester Serv. Corp.*, 293 U.S. 449 (1935), an order refusing to enforce a binding, contractual forum-selection clause is immediately reviewable on appeal under 28 U.S.C. §1291 or 28 U.S.C. §1292(a)(1).

## RULE AND STATUTES INVOLVED

The rule and statutory provisions involved are F.R.Civ. P. 14(a) and 28 U.S.C. §§1291 and 1292(a)(1). They provide in relevant part:

F.R.Civ.P. 14(a):

> "When Defendant may Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . . Any party may move to strike the third-party claim, or for its severance or separate trial. . . ."

28 U.S.C. §1291:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

28 U.S.C. §1292(a)(1):

> "The courts of appeals shall have jurisdiction of appeals from:
>
> > "Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

## STATEMENT OF THE CASE

### Introduction

This petition involves a disagreement among three district court judges in two different judicial circuits as to where a contract dispute between petitioner Arthur G. McKee & Company and respondent G.C.S., Inc. should be litigated.* All three judges had before them actions arising under a construction subcontract between McKee as general contractor and G.C.S. as subcontractor. In a forum-selection clause in the subcontract, McKee and G.C.S. agreed to consolidate all disputes arising out of their contract before a single forum selected by McKee. Pursuant to its right under the forum-selection clause, McKee designated the United States District Court for the Northern District of Illinois as the single forum to resolve these disputes.

Two of the judges (Hon. Thomas R. McMillen of the Northern District of Illinois and Hon. Herbert P. Sorg of the Western District of Pennsylvania) have ruled that, under this Court's decision in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the forum-selection clause is valid and reasonable and, further, that McKee's choice of the Illinois court is reasonable. Therefore, those judges have required G.C.S. to litigate its contract claims against McKee in the Illinois court. However, the third judge (Respondent Hon. Daniel J. Snyder, Jr. of the Western District of Pennsylvania) ruled in the instant case that since the contract claims in the lawsuit before him were asserted in a third-party complaint by G.C.S. against McKee, neither

* G.C.S. is a wholly-owned subsidiary of respondent I.S.C., Inc. Throughout this petition, we denominate I.S.C. and G.C.S. together as "G.C.S." since they have made identical claims below as to all matters relevant to the petition.



the *Bremen* decision nor the decisions of Judges McMillen and Sorg required him to give effect to the agreement of the parties.

As a result, a complex contract dispute is proceeding in two courts simultaneously and, inevitably, will require protracted appeals in two circuits to determine the effect substantive decisions in each case have upon the other one. Moreover, as matters now stand each case will be tried to a jury, increasing the likelihood of inconsistent judgments, and further confusing the appeals.*

### The Parties and the Litigation

In 1973, the United States Steel Corporation contracted with McKee's Chicago-based Food and Pharmaceutical Division for the construction of a pollution control facility at Clairton, Pennsylvania. In January, 1974, McKee verbally awarded a lump sum subcontract for the bulk of the piping work on the project to respondent G.C.S., Inc.

The McKee-G.C.S. subcontract was negotiated in Chicago and was formally executed there by the parties during April, 1974. As part of the subcontract, G.C.S. accepted from McKee a purchase order for valves to be used on the U.S. Steel project which one week earlier McKee had placed with respondent McJunkin Corporation's suburban-Chicago branch office. The subcontract specifically recited that G.C.S. would be responsible for ordering any additional valves required on the project which were not included on the purchase order. Subsequently, G.C.S. placed its own confirming purchase orders with McJunkin and other suppliers for most of the valves on McKee's

* Even if one party loses both trials, it will have to appeal from both judgments—in different judicial circuits—in order to preserve its rights in all the lawsuits. *Reed* v. *Allen*, 286 U.S. 191, 198-99 (1932).

initial purchase order and for pipe and fittings as well as other valves needed for the project.

Numerous disputes developed between McKee and G.C.S. over their responsibilities under the subcontract and the quality of their respective work during 1974 and 1975. In early 1975, McKee began withholding some of its monthly payments to G.C.S., and G.C.S. in turn began withholding some payments to its suppliers, including McJunkin. In March, 1975, McJunkin sued G.C.S. in the United States District Court for the Western District of Pennsylvania (the "*McJunkin case*") for the balance due on G.C.S.'s account, invoking the district court's diversity jurisdiction under 28 U.S.C. §1332. McJunkin's complaint, which was assigned to Judge Snyder, made no claims against McKee.

Matters between McKee and G.C.S. came to a head during May, 1975. On May 16, 1975, McKee and G.C.S. sued each other for breach of contract and negligence in the United States District Court for the Northern District of Illinois (the "*McKee case*"), and in the United States District Court for the Western District of Pennsylvania (the "*G.C.S. case*"), respectively. The *McKee case* was assigned to Judge McMillen and the *G.C.S. case* was assigned to Judge Sorg. Both cases invoked the courts' diversity jurisdiction under 28 U.S.C. §1332.

Thus, as of May 16, 1975, three different lawsuits arising out of the same construction project were pending before three different federal judges.

**The Forum-Selection Clause**

The forum-selection clause in the McKee-G.C.S. subcontract expressly provides that all disputes arising out of the Clairton project which involve McKee and G.C.S. are to



be resolved before one forum selected by McKee. The clause gives McKee the right to choose either an arbitration panel or a court as the forum and, to that end, provides that G.C.S. will consent to the stay of any proceedings between McKee and G.C.S. involving the Clairton project which are pending before other forums:

> "36. DISPUTES: It is the general intention of the parties that *any dispute relating to this Subcontract or the Prime Contract or involving a matter or question of law or fact common to them or the parties thereto shall be settled, to the extent feasible, before a single forum selected by Contractor*, and a decision by such forum with respect to any such question or matter shall be binding on Subcontractor, provided that it has a reasonable opportunity to be represented and heard. To this end:
>
> "(a) [Gives McKee the right to require arbitration.]
>
> "(b) If Contractor shall not elect arbitration, or *if in the opinion of Contractor any dispute involves either a matter or question of law or fact common to the Subcontract and the Prime Contract or involves third parties the dispute shall at the option of the Contractor be submitted to the forum which in Contractor's reasonable opinion can best determine and settle most aspects of such dispute* and the decision of that forum shall be binding on the parties, provided that they have been given notice and the opportunity for adequate representation.
>
> "(c) *In the event of any proceeding pursuant to this provision, the parties shall take action to see that proceedings before any other forum shall be stayed pending completion of such proceeding* and the decision of the forum with respect to such proceeding pursuant to this

provision shall be binding upon the parties and supersede any contrary decision of any other arbitrators or forum to the extent equitable.

"(d) Subcontractor hereby consents to such service and to submit itself to such jurisdiction as is necessary to effect the purposes of this Clause 36, and further *hereby agrees to and consents to such stays and other actions necessary to effect the purposes hereof.*" (App. 6-7; emphasis added).

McKee filed a motion before Judge Sorg to stay the *G.C.S. case* under the forum-selection clause or to transfer the *G.C.S. case* to the Illinois court under 28 U.S.C. §1404 (a). G.C.S. then filed a motion before Judge McMillen to transfer the *McKee case* to the Pennsylvania court under 28 U.S.C. §1404(a). Shortly thereafter, McKee agreed to let Judge McMillen determine the validity and enforceability of the clause and whether the Illinois court was a reasonable forum in which to litigate the McKee-G.C.S. contract dispute. Therefore, McKee withdrew its motion to stay or transfer the *G.C.S. case* and filed an answer preserving its rights under the forum-selection clause in the McKee-G.C.S. subcontract, and argued as an additional defense that the claims asserted in G.C.S.'s complaint should be asserted as counterclaims in the *McKee case* under F.R.Civ.P. 13(a).

In its motion before Judge McMillen, G.C.S. argued that the convenience of the parties and witnesses and the pendency of the *McJunkin case* in addition to the *G.C.S. case* in the Pennsylvania court mandated transfer of the *McKee case* to Pennsylvania so all three related cases could be heard together. To underscore its point, G.C.S. filed a third-party complaint against McKee in the *McJunkin case*



on June 16, 1975, one month after the *McKee case* and *G.C.S. case* had been filed. That third-party complaint is the subject of this petition. Following the procedure adopted in the *G.C.S. case,* McKee answered the third-party complaint, reserving its defenses under the forum-selection clause.

**The Conflicting Decisions**

On November 7, 1975, Judge McMillen denied G.C.S.'s motion to transfer the *McKee case* to the Pennsylvania court, specifically holding that the parties' forum-selection clause was valid and enforceable under the circumstances. (App. 19). Judge McMillen ruled that, under this Court's decision in *The Bremen* v. *Zapata Off-Shore Co.,* 407 U.S. 1 (1972), McKee possessed the right to consolidate its contract disputes with G.C.S. in the Illinois court. Judge McMillen noted that the whole *McJunkin case* "apparently" could not be transferred to the Northern District of Illinois, but he concluded that the pendency of another related lawsuit in Pennsylvania against G.C.S. was no reason to depart from the *Bremen* rule as it applied to the contractual agreement between McKee and G.C.S. (App. 17, 19). Judge McMillen also stated that the convenience of the parties and witnesses as well as the interests of justice favored trial of the disputes in Illinois. (App. 25). To avoid any prejudice to the parties, Judge McMillen indicated that, since McJunkin is located in the Northern District of Illinois, he is willing to permit McJunkin to be joined in the Illinois litigation, and that he will not require G.C.S. to relitigate in Illinois any matters determined between McJunkin and G.C.S. in Pennsylvania. (App. 19).

Thereafter, McKee renewed its motion to stay the *G.C.S. case* or to transfer it to Illinois, and moved in the *McJunkin*

*case* to sever and transfer G.C.S.'s third-party complaint against McKee to Illinois. McJunkin consented to the latter motion, but G.C.S. opposed each one.

On March 19, 1976, Judge Sorg concurred in Judge McMillen's decision and transferred the *G.C.S. case* to Illinois. (App. 25). However, on March 22, 1976, Judge Snyder refused to follow the decisions of Judges McMillen and Sorg.*

Judge Snyder based his refusal to enforce the clause on the proposition that forum-selection clauses cannot be enforced in third-party actions because an agreement between a third-party plaintiff and third-party defendant cannot be construed to affect the initial plaintiff's rights. (App. 8). He did not indicate how staying or transferring G.C.S.'s third-party action against McKee would affect McJunkin's rights. In addition, Judge Snyder held that the claims asserted in G.C.S.'s third-party complaint were not compulsory counterclaims in the *McKee case* under F.R.Civ.P. 13(a) since they will not be "mature" until a judgment is entered in the main part of the *McJunkin case.* (App. 9).**

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* Although not presented in this petition as a separate reason for granting the writ, McKee argued in the Third Circuit as part of its petition for a writ of mandamus that Judge Snyder's orders represented a substantial abuse of discretion since they amounted to a reversal of the rulings of Judges McMillen and Sorg. *See, e.g., Ellicott Mach. Corp.* v. *Modern Welding Co.,* 502 F.2d 178, 181 (4th Cir. 1974); *Gulf Research & Dev. Co.* v. *Schlumberger Well Surveying Corp.,* 98 F. Supp. 198, 200-01 (D. Del.), *petition for writ of mandamus denied,* 193 F.2d 302 (3d Cir. 1951).

** McKee does not agree with Judge Snyder's conclusion that G.C.S.'s third-party claims against McKee are not mature, especially since G.C.S. had previously raised the same claims in its complaint

(Footnote continued)



McKee moved for Judge Snyder to reconsider his ruling in view of the facts that (1) the initial plaintiff, McJunkin, consented to a severance and transfer of the third-party action, and (2) practically, it would be difficult if not impossible to prevent G.C.S. from asserting in the *McJunkin* third-party action its claims in the *G.C.S. case* which Judge Sorg had ordered must be litigated in Illinois.* However, on June 18, 1976, Judge Synder confirmed his prior decision, refusing to sever and transfer or to stay G.C.S.'s third-party complaint.

Within one week after Judge Snyder's second decision, G.C.S. filed its pretrial statement in the instant case, ex-

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(Footnote continued)

in the *G.S.C. case* where they remain pending. As this Court stated in *Southern Constr. Co.* v. *Pickard,* 371 U.S. 57, 60 (1962), Rule 13(a) "was particularly directed against one who failed to assert a counterclaim in one action and then instituted a second action in which that counterclaim became the basis of the complaint." This is precisely what G.C.S. has done below.

However, even if Judge Snyder were correct on this point, it should be noted that (1) the forum-selection clause is not limited by its terms to "mature" claims, and (2) under F.R.Civ.P. 13(e), G.C.S. can assert after-acquired claims in the Illinois litigation.

* In fact, G.C.S. later impleaded McKee in yet another lawsuit arising out of the McKee-G.C.S. subcontract. G.C.S. assigned part of its responsibilities under the subcontract to Honeywell, Inc. On July 30, 1975, Honeywell sued G.C.S. in the Court of Common Pleas of Allegheny County, Pennsylvania for breach of the Honeywell-G.C.S. argeement, and, on September 10, 1975, G.C.S. filed a third-party complaint against McKee. McKee moved to sever and dismiss or stay that third-party action but the state court, citing Judge's Snyder's ruling, denied McKee's motion. (App. 27-28). Thus, if Judge Snyder's decision is permitted to stand, the McKee-G.C.S. dispute will actually be litigated before *three* courts, with no possibility of consolidating the cases on appeal.

pressly raising in the *McJunkin case* for the first time many of the claims it had asserted in its complaint in the *G.C.S. case* which Judge Sorg had transferred to the Illinois court. McKee immediately moved to strike G.C.S.'s pretrial statement and for Judge Snyder to reconsider his refusal to stay the third-party action as provided in the parties' forum selection clause. McKee pointed out that Judge Sorg had already held that clause valid and binding with respect to the claims asserted in the *G.C.S. case,* and that to permit G.C.S. to re-assert those same claims in the instant case was tantamount to reversing Judge Sorg's order. Judge Snyder took McKee's motion under consideration, but on July 21, 1976, he denied the motion without opinion. (App. 15-16).

On August 11, 1976, McKee filed a notice of appeal from Judge Snyder's July 21, 1976 order and, on August 17, 1976, McKee filed a petition for a writ of mandamus directing Judge Snyder to vacate his July 21, 1976 order. On August 18, 1976, the United States Court of Appeals for the Third Circuit consolidated McKee's appeal and mandamus petition, directed respondents G.C.S. and McJunkin to answer McKee's petition, and established an expedited briefing schedule in the appeal. However, after hearing oral argument in the cases on October 5, 1976, the Third Circuit dismissed both the appeal and the petition on October 28, 1976, without opinion. (App. 1-2).



## REASONS FOR GRANTING THE WRIT

### A. JUDGE SNYDER'S DECISIONS ARE IN DIRECT CONFLICT WITH A CONTROLLING DECISION OF THIS COURT.

Judge Snyder and, implicitly, the Third Circuit have held that a valid and binding forum-selection clause cannot be enforced by a third-party defendant against a third-party plaintiff despite unambiguous language in the clause which expressly contemplates and provides for such enforcement. That decision is in direct conflict with this Court's decision in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

*Bremen* involved a towage contract between American and German corporations. The contract contained a forum-selection clause which provided that any disputes arising out of the parties' contractual relationship must be litigated in London, England. Despite the English courts' rulings that the clause was valid and reasonable, the American court refused to enforce the clause and enjoined the parties from proceeding in England. This Court vacated the injunction and stated that a "forum clause should control absent a strong showing that it should be set aside." 407 U.S. at 15. Such a showing requires "the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." 407 U.S. at 18.*

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* Although *Bremen* was decided in the context of an international transaction, lower courts have uniformly interpreted the policies announced in *Bremen* as applying to domestic disputes. *Fireman's Fund Amer. Ins. Cos.* v. *Puerto Rican Forwarding Co.*, 492 F.2d 1294, 1296-97 (1st Cir. 1974); *Solomon* v. *Solomon*, 516 F.2d 1018, 1019-20 n.1 (3d Cir. 1975); *In-Flight Devices Corp.* v. *Van Dusen Air, Inc.*, 466 F.2d 220, 234 n.24 (6th Cir. 1972); *National Equip. Leasing Corp.* v. *Farrier*, 486 F.2d 258, 261 n.2 (10th Cir. 1973).

Here, there is no question that G.C.S. will have its day in court on the claims raised in the third-party complaint since G.C.S. had previously raised all of these claims, and several others, in its complaint in the *G.C.S. case* now pending in Illinois. In fact, the forum-selection clause specifically lists disputes "involv[ing] third parties" among those proceedings which G.C.S. agrees to stay pending resolution of the main McKee-G.C.S. action. Since the clause was held valid and reasonable by Judges McMillen and Sorg, there are no grounds, under *Bremen*, for permitting G.C.S. to avoid its contractual obligations.

Judge Snyder nevertheless held that the *Bremen* rule is not applicable to third-party actions where the initial plaintiff's claim does not rely on the agreement which contains the forum-selection clause. He reasoned that since the plaintiff cannot be compelled to accept someone else's choice of forum under the clause, the defendant/third-party plaintiff must be given the opportunity to fully defend himself against the plaintiff's claim by impleading third-parties under F.R.Civ.P. 14(a), despite the express provisions of a forum-selection clause intended to prevent duplicative litigation between the parties. Therefore, Judge Snyder ruled that he will permit G.C.S. to litigate "one small portion" of the McKee-G.C.S. contract dispute in his court.* (App. 13).

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* Judge Snyder made this statement in his order of June 18, 1976, which denied McKee's motion for reconsideration of his earlier order. It subsequently became clear that much more than "one small portion" of the McKee-G.C.S. contract dispute was involved in the third-party action. When G.C.S. filed its pretrial narrative statement on June 24, 1976, it expressly raised claims relating to McKee's performance on the project, which were first raised in the *G.C.S. case* and ultimately transferred to Illinois by Judge Sorg. Those claims involve all aspects of the contract dispute.



*Bremen* does not mandate applying a rigid rule that would require enforcement of forum-selection clauses in all situations. But, as Judge McMillen correctly held, the fact that a third-party has sued G.C.S. in the Western District of Pennsylvania is no reason to depart from the *Bremen* rule. *Tai Kien Indus. Co.* v. *M/V Hamburg*, 528 F.2d 835, 836 (9th Cir. 1976). Nor does the mere availability to G.C.S. of a Rule 14 impleader permit a court to ignore parties' clear contractual agreements. *E.g., Iron Mines Co. of Venezuela* v. *SS Cosmic*, 268 F. Supp. 749, 751 (S.D.N.Y. 1966); *Peter Pan Fabrics, Inc.* v. *Kay Windsor Frocks, Inc.*, 187 F. Supp. 763, 764 (S.D.N.Y. 1959) (arbitration cases).* This is particularly true where, as here, the initial plaintiff (McJunkin) has consented to the severance and stay, transfer, or separate trial of the third-party action, and where the defendant/third-party plaintiff contractually is obligated to so consent.

It was entirely foreseeable in a large construction project that G.C.S. might become involved in litigation with its suppliers and subcontractors. As Judge McMillen noted, in view of the number and different locations of subcontractors, suppliers, and employees involved with the Clairton project, McKee had a "valid reason for attempting to centralize its disputes in a single forum" when negotiating and subcontracting the work. (App. 19). For that reason, the clause expressly covered actions "involving third parties." G.C.S. agreed to be bound by the terms of the

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* Similarly, in *Bremen*, this Court rejected the argument that the availability of an *in rem* limitation of liability procedure was sufficient to warrant ignoring the parties' forum-selection agreement, stating that "the language of the clause is clearly mandatory and all-encompassing." 407 U.S. at 20. As noted above, the forum-selection clause in the McKee-G.C.S. subcontract clearly encompasses third-party action (see p. 7 *supra*).

clause—which expressly covered such situations—and received consideration for that promise. *Central Contracting Co.* v. *Maryland Cas. Co.*, 367 F.2d 341, 344 (3d Cir. 1966).

In accordance with the policy of reducing uncertainties of commercial litigation which this Court approved in *Bremen*, 407 U.S. at 13-14, the forum-selection clause serves to eliminate the uncertainty and expense of duplicative and expensive litigation in different forums. Particularly in a situation like that presented in this petition—where permitting an impleader increases the number of forums in which a lawsuit is proceeding and so negates the policies Rule 13 and 14 were intended to promote—Judge Snyder's order is directly contrary to the rule and policy established by this Court in *Bremen*.

## B. JUDGE SNYDER'S REFUSAL TO STAY THE THIRD-PARTY ACTION AS REQUIRED BY THE FORUM-SELECTION CLAUSE IS IMMEDIATELY APPEALABLE BY McKEE AS OF RIGHT.

In addition to denying McKee relief by mandamus against Judge Snyder's refusal to follow the *Bremen* rule in the proceeding below, the Third Circuit also dismissed McKee's appeal from Judge Snyder's July 21, 1976 Order refusing to stay the third-party action. Under this Court's decisions in *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), and *Shanferoke Coal & Supply Corp.* v. *Westchester Serv. Corp.*, 293 U.S. 449 (1935), the court of appeals had jurisdiction of McKee's appeal pursuant to both 28 U.S.C. §1291 and 28 U.S.C. §1292(a)(1).

### Jurisdiction under 28 U.S.C. §1291

*Cohen* involved a derivative action brought by a shareholder against a corporation's officers and directors for



alleged fraud and waste of corporate assets. The corporation's by-laws obligated it to indemnify the officers and directors for the cost of a successful defense. Pursuant to a state statute, the corporation moved to require the shareholder to post security for costs. After the district court denied the motion, this Court reversed and noted that the lower court's refusal to enforce the state statute was appealable as a "final decision" under 28 U.S.C. §1291:

> "[T]his order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. *When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably.* We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case." 337 U.S. at 546. (Emphasis added).

The *Cohen* decision was recently reaffirmed by this Court in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). *Eisen* involved an appeal from a district court order certifying a class under F.R.Civ.P. 23(c)(2) and imposing most of the costs of notice to the class upon the defendants. Citing *Cohen*, this Court held the order appealable pursuant to 28 U.S.C. §1291 because the order "concerned a collateral matter that could not be reviewed effectively on appeal from the final judgment." The Court set forth two requirements for review under the *Cohen* doctrine: (1) the order appealed from must not be "tentative, informal or incomplete," but rather must conclusively determine a claim of right, and (2) the order must not constitute "merely a step toward final disposition of the merits of the case." 417 U.S. at 171.

This is precisely the situation below. Judge Snyder has conclusively ruled that McKee is not entitled to the benefits of a contractual agreement to litigate all disputes arising out of the McKee-G.C.S. subcontract in the Illinois court. McKee's rights under the forum-selection clause are not an element of McKee's defense to the substantive claims in G.C.S.'s third-party complaint, and Judge Snyder's order refusing to enforce the clause will not merge in a final judgment on the third-party action. Furthermore, as this Court stated in *Cohen,* 28 U.S.C. §1291 must be given a "practical rather than a technical construction." 337 U.S. at 546. Practically, the damage which the clause seeks to prevent—the expense and risk of inconsistent results inherent in multiple trials of identical claims—will already have occurred if review is postponed until a final judgment is entered in the *McJunkin case.*

**Jurisdiction under 28 U.S.C. §1292(a)(1)**

*Shanferoke Coal* involved a coal supply contract which provided that any disputes arising out of the contract would be arbitrated. However, after a dispute developed, one party violated this agreement and filed a contract action. When the trial court refused to stay the lawsuit pending arbitration, this Court ruled that the refusal was appealable under the predecessor to 28 U.S.C. §1292(a)(1).* The Court noted that, under *Enelow* v. *New York*

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* Although decided under the predecessor to 28 U.S.C. §1292(a)(1), *Shanferoke Coal* has been applied uniformly under §1292(a)(1): *Blake Constr. Co.* v. *International Laborers' Union,* 511 F.2d 324, 326 (D.C. Cir. 1975); *Warren Bros. Co.* v. *Cardi Corp.,* 471 F.2d 1304, 1306 (1st Cir. 1973); *Standard Chlorine of Del., Inc.* v. *Leonard,* 384 F.2d 304, 308 (2d Cir. 1967); *Jackson Brewing Co.* v. *Clarke,* 303 F.2d 844, 845 (5th Cir. 1962); *Danford* v. *Schwabacher,* 488 F.2d 454, 455 (9th Cir. 1973).



*Life Ins. Co.,* 293 U.S. 379, 381-83 (1935), the denial of an equitable or special defense to an action at law was appealable as the denial of an interlocutory injunction. In *Shanferoke Coal,* this Court concluded that a contractual right to a stay was such an equitable or special defense. 293 U.S. at 452.

At a minimum, the forum-selection clause in the McKee-G.C.S. subcontract entitles McKee to a stay of the third-party action in the *McJunkin case.* Since the third-party complaint only seeks money damages for alleged breaches of the McKee-G.C.S. subcontract, the third-party action is unquestionably an action at law. Therefore, under *Shanferoke Coal,* Judge Snyder's refusal to grant McKee a stay of the third-party action is appealable as of right under 28 U.S.C. §1292(a)(1), and the Third Circuit erred in dismissing McKee's appeal.

## CONCLUSION

In *The Bremen* v. *Zapata Off-Shore Co.,* 407 U.S. 1, 18 (1972), this Court held that reasonable and fairly negotiated forum-selection clauses must be enforced absent a showing by "the party seeking to escape his contract . . . that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." The decision below—authorizing the resisting party to avoid its contractual obligation merely because enforcement is requested in a third-party context—does violence to both the holding of *Bremen* and the rationale behind it. Here, the clause applies by its terms to disputes "involv[ing] third parties," the third-party (McJunkin) has consented to McKee's request for enforcement, and two district courts have upheld and enforced the clause against the single resisting party.

As a result of the decision below, McKee has been unjustly deprived of the benefit of its bargain, and the parties, witnesses and courts will be burdened by two trials of the same issues. Neither principles of freedom of contract, nor principles of comity and judicial economy, nor the interests of justice, nor this Court's decision in *Bremen* support such a result.

For all the foregoing reasons, the petition should be granted.

Respectfully submitted,

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Dated: January 17, 1977

# APPENDIX

## APPENDIX 1

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Nos. 76-2064 and 76-2065

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ARTHUR G. McKEE & COMPANY,

*Petitioner in No. 76-2064*

v.

G.C.S., INC., I.S.C., INC., AND McJUNKIN CORP.,

*Respondents,*

and

HONORABLE DANIEL J. SNYDER, JR., United States District Judge for the Western District of Pennsylvania,

*Nominal Respondent.*

On Petition for Writ of Mandamus

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McJUNKIN CORPORATION,

*Plaintiff,*

v.

G.C.S., INC., AND I.S.C., INC.,

*Defts. and 3d-party plaintiffs in D.C.*

v.

ARTHUR G. McKEE & COMPANY,

*3d party defendant in D.C.*

(D.C. Civil Action No. 75-351)

On Appeal from the United States District Court for the Western District of Pennsylvania

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Argued October 5, 1976

Before: FORMAN, ADAMS and WEIS, *Circuit Judges*

JUDGMENT ORDER

After considering all the contentions raised by the appellant-petitioner, it is

ADJUDGED AND ORDERED that the appeal and the petition for a writ of mandamus are hereby dismissed.

Each side to bear its own costs.

BY THE COURT,

/s/ *A. M. Adams*
Circuit Judge

ATTEST:

/s/ *Thomas F. Quinn*
Thomas F. Quinn
Clerk

DATED: Oct. 28, 1976



**APPENDIX 2**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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McJUNKIN CORPORATION,
*Plaintiff,*

vs.

G.C.S., INC., and I.S.C., INC.,
*Defendants and Third-Party Plaintiffs,*

vs.

ARTHUR G. McKEE & COMPANY,
*Third-Party Defendant.*

Civil Action No. 75-351

---

OPINION AND ORDER

SNYDER, J.

In this diversity contract action, McJunkin Corporation has sued G.C.S., Inc. and its guarantor, I.S.C., Inc., for merchandise sold to G.C.S. The Defendants brought a third-party action against Arthur G. McKee & Company, alleging that McKee entered into a valve purchase order with McJunkin and this purchase order was later assigned to G.C.S. by McKee, on condition that McKee assure G.C.S. that McJunkin would accept the return by G.C.S. of any unsuitable or excess merchandise ordered from McJunkin by McKee as well as similar items subsequently ordered by G.C.S. directly from McJunkin. When G.C.S. attempted to make returns, McJunkin allegedly accepted only one

of four tendered truckloads of excess material and McKee also refused the returns.

McKee, the prime contractor on a construction contract for the United States Steel Corporation, brought suit on May 16, 1975 in the United States District Court for the Northern District of Illinois (*Arthur G. McKee & Company* v. *G.C.S., Inc.*, No. 75 C 1578), alleging that G.C.S. as its piping subcontractor had materially breached the subcontract in several major aspects,[1] resulting in McKee being required to spend an additional $328,000.00 to complete its contract. On the same day, G.C.S. instituted suit against McKee in the United States District Court for the Western District of Pennsylvania (*G.C.S., Inc.* v. *Arthur G. McKee & Company,* No. C.A. 75-604) (the first Pittsburgh case), alleging that McKee breached the subcontract by failing to permit G.C.S. to perform the subcontract in an orderly manner and by negligently performing its duties as the prime contractor; and seeking $1,950,000.00 in damages.

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[1] Specifically, the Illinois action complained of the following:

"a. failing to construct the utility stations according to the specifications of the subcontract and supplements thereto;

b. constructing only one of the three required eye wash stations;

c. failing to steam trace the piping for freeze protection;

d. performing its painting tasks in an unworkmanlike manner and in violation of the specifications;

e. failing to perform adequate engineering work for pipe supports and hangers;

f. failing to properly connect pipes to pumps and equipment; and

g. failing to conform to the overall job requirement schedules and failing to complete all work required under the subcontract by December 31, 1974."



G.C.S. moved to transfer the Illinois action to the Western District of Pennsylvania pursuant to 28 U.S.C. §1404 (a).[2] At the same time in the first Pittsburgh action, McKee moved for a "Stay or Other Relief", contending that a forum selection clause in the McKee-G.C.S. subcontract limited the action to a forum selected by McKee.

On November 7, 1975, Judge McMillen held in the Illinois case that the forum selection clause was enforceable under the standards set forth in *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), and denied the §1404(a) Motion for Transfer. In light of Judge McMillen's ruling, McKee pressed its Motion for Stay or Other Relief in the first Pittsburgh case, and this Motion was granted, and the case was sent to Illinois.

Prior thereto, the Defendants in this action (the second Pittsburgh case) moved for an Order permitting the joining of McKee as a third-party defendant, which Motion was granted by the Court. The third-party complaint alleged that before G.C.S. was chosen to be the piping subcontractor on the McKee contract with United States Steel, McKee had entered into the valve purchase order with McJunkin which is the subject of this proceeding, and that McKee's purchase order was later assigned to G.C.S. under the conditions previously noted.

After Judge McMillen's ruling in the Illinois case, McKee moved in this Court to sever and transfer the third-party action and in support thereof argued:

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[2] 28 U.S.C. §1404(a) provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

1. The forum selection clause in the McKee-G.C.S. subcontract would require the transfer of the third-party action since the contractor has chosen Illinois as the single forum for the resolution of disputes under the subcontract.

2. The third-party action in this suit is a Rule 13(a) compulsory counterclaim to the Illinois action.

3. Rule 14(a) of the Federal Rules of Civil Procedure dictates a severance of the third-party action in order to simplify the issues as between McKee and G.C.S., who are involved in litigation there.

Defendants G.C.S. and I.S.C. have objected to the severance and transfer.

## THE FORUM SELECTION CLAUSE

Paragraph 36 of the General Terms and Conditions of the G.C.S. subcontract (the forum selection clause) provides:

> "DISPUTES: It is the general intention of the parties that any dispute relating to this Subcontract or the Prime Contract or involving a matter or question of law or fact common to them or the parties thereto shall be settled, to the extent feasible, before a single forum selected by the Contractor, and a decision by such forum with respect to any such question or matter shall be binding on Subcontractor, provided that it has a reasonable opportunity to be represented and heard. To this end:
>
> • • •
>
> (b) If Contractor shall not elect arbitration, or if in the opinion of Contractor any dispute involves



> either a matter of question of law or fact common to the Subcontract and the Prime Contract or involves third parties the dispute shall at the option of the Contractor be submitted to the forum which in Contractor's reasonable opinion can best determine and settle most aspects of such dispute and the decision of that forum shall be binding on the parties, provided that they have been given notice and the opportunity for adequate representation.
>
> (c) In the event of any proceeding pursuant to this provision, the parties shall take action to see that proceedings before any other forum shall be stayed pending completion of such proceeding and the decision of the forum with respect to such proceeding pursuant to this provision shall be binding upon the parties and supersede any contrary decision of any other arbitrators or forum to the extent equitable.
>
> (d) Subcontractor hereby consents to such service and to submit itself to such jurisdiction as is necessary to effect the purposes of this Clause 36, and further hereby agrees to and consents to such stays and other actions necessary to effect the purposes hereof."

It is undisputed that McKee, pursuant to its contractual rights under the forum selection clause, selected the United States District Court for the Northern District of Illinois. As noted, Judge McMillen held in that action that the agreement was enforceable and stated [App. 19]:

> ". . . The plaintiff as an international construction firm has a valid reason for attempting o centralize its

disputes in a single forum, and there is no evidence that this clause was negotiated unfairly or by means of undue influence or unequal bargaining power. . . ."

We agree entirely with Judge McMillen's conclusions under the authority of *M/S Bremen, supra. See also,* the opinion of this Court in *Spatz* v. *Nascone,* 364 F.Supp. 967 (W.D. Pa. 1973).

The issue before Judge McMillen, however, was the enforceability of the forum selection clause in the context of a claim against G.C.S. by McKee, and not the construction of the clause in the context of a third-party action. In our case there exists no dispute as such between McKee and G.C.S., except as a derivative[3] action by G.C.S. against McKee based solely on the McJunkin claim. The forum selection clause, by its terms, simply does not apply to the claims being asserted here.

Nor do the ends of orderly judicial administration, consolidation of disputes involving related transactions, or any other arguments by the third-party defendant dictate, to our way of thinking, any different results. Paragraph 36 is clear that the intention of the parties was that any dispute involving a matter of law or fact should be settled to the extent feasible before a forum selected by the contractor—McKee. The Complaint in the instant proceeding involves a purchase order made even prior to the execution of the subcontract and involving a claim by a person not a party thereto. Thus there is no reason for calling the forum selection clause into operation, and no mandate

[3] *See Southeast Mortgage Company* v. *Mullins,* 514 F.2d 747 (5th Cir. 1975); *United States* v. *Joe Grasso & Son, Inc.,* 380 F.2d 749 (5th Cir. 1967); *National Fire Ins. Co. of Hartford* v. *Daniel J. Keating Co.,* 35 F.R.D. 137 (W.D. Pa. 1964).



exists for transfer of the third-party action to the Northern District of Illinois pursuant to 28 U.S.C. §1404(a).

## COMPULSORY COUNTERCLAIM

As we have noted, McKee contends that the third-party complaint must be severed inasmuch as the claim has become a compulsory counterclaim in the Illinois action, as provided by Rule 13(a), Fed.R.Civ.P. Rule 13(a) provides that the claim must be mature "at the time of serving the pleading". The courts have consistently held that where a claim is dependent on the outcome of other litigation it is not mature but only contingent. *Stahl* v. *Ohio River Company,* 424 F.2d 52 (3d Cir. 1970); *Chicago Freight Car Leasing Co.* v. *Martin Marietta Corp.,* 66 F.R.D. 400 (N.D. Ill. 1975); *Cyclotherm Corporation* v. *Miller,* 11 F.R.D. 88 (W.D. Pa. 1950).

G.C.S.'s claim against McKee, arising out of the purchase order assignment, depends entirely upon the outcome of the McJunkin versus G.C.S. claim. It is thus dependent upon the resolution of a "primary matter" and is therefore not mature. *Chapin & Chapin, Inc.* v. *McShane Contracting Co., Inc.,* 374 F.Supp. 1191 (W.D. Pa. 1974). The contention is without merit.

## SEVERANCE OF THIRD-PARTY CLAIM

McKee finally asks for a Rule 14(a) discretionary severance, alleging that prejudice or confusion would otherwise result. *See* 3 *Moore's Federal Practice* ¶14.01[8] at p. 14-46 (2d ed. 1974). It is the opinion of this Court that retention of this third-party claim within the confines of this purchase order suit will isolate the supplier, contractor and subcontractor, and will prove for the expeditious resolution of this distinct problem between the parties. It

will not, as McKee suggests, cause confusion. The main suit between McKee and G.C.S. is large and complex, involving numerous claims and counterclaims arising out of a multi-million dollar construction contract. McJunkin's claim against G.C.S. and I.S.C. could become lost in this much larger action. We thus decline to exercise discretion by ordering a severance and transfer as provided in Rule 14(a), Fed.R.Civ.P.

An appropriate Order will be entered.

ORDER OF COURT

AND NOW, to-wit, this 22nd day of March, 1976, after due consideration of and argument on the Motion of the Third-Party Defendant Arthur G. McKee & Company, to Sever and Transfer, and for the reasons as set forth in the accompanying Opinion of the Court,

IT IS ORDERED that the Motion be and the same is hereby denied.

/s/ *Daniel J. Snyder, Jr.*
United States District Judge



## APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

McJunkin Corporation, a corporation,
*Plaintiff,*

vs.

G.C.S., Inc., a corporation, and
I.S.C., Inc., a corporation,
*Defendants*
*and Third-Party Plaintiffs,*

vs.

Arthur G. McKee & Company, a corporation,
*Third-Party Defendant.*

Civil Action No. 75-351

OPINION

SNYDER, J.

The Third Party Defendant, Arthur G. McKee & Company (McKee), moved this Court to reconsider its Order of March 22, 1976, denying McKee's Motion to transfer this subcontract action to the Illinois Court having jurisdiction of the *McKee* v. *G.C.S., Inc.* main contract proceedings,[1]

[1] G.C.S. moved for transfer of the Illinois action to the Western District of Pennsylvania, which motion was denied by Judge McMillen on the basis that the Forum Selection Clause of the Contract was enforceable. G.C.S. had entered suit against McKee in the Western District of Pennsylvania (C.A. 75-604) and Chief Judge Sorg transferred that case to Illinois.

and McKee filed an Amended Motion to Bifurcate and Stay the Third-Party Action brought it by G.C.S., Inc. and I.S.C., Inc. In the alternative, McKee moved for entry of an Order transferring the entire proceedings to the Illinois Court pursuant to 28 U.S.C. §1404(a).[2]

This Court concluded in its previous Order that:

1) G.C.S.'s Third-Party Complaint did not arise out of the McKee-G.C.S. contract, and, therefore, that the Forum Selection Clause contained in the McKee-G.C.S. contract did not apply to the Third-Party Complaint.

(2) The claims in G.C.S.'s Third-Party Complaint were wholly contingent upon the outcome of McJunkin's Complaint, and, therefore, were neither compulsory counterclaims in the contract action brought by McKee against G.C.S. in Illinois, nor claims which were encompassed in the contract action brought by G.C.S. against McKee in this district.

(3) The issues raised in the Third-Party action were "distinct" from those now being litigated in the parties' contract actions in Illinois and, therefore, did not require a discretionary severance and transfer pursuant to Federal Rule of Civil Procedure 14(a).

McKee again contends that the claims raised in the Third-Party Complaint are identical to many of those now being litigated in Illinois. As we noted in our Opinion and Order of March 22, 1976, the issue before Judge McMillen was the enforceability of the Forum Selection Clause

[2] 28 U.S.C. §1404(a) provides:
"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."



in the context of the claims against G.C.S. by McKee, and not the construction of that Clause in the context of a third-party action. We concluded then, as we conclude now, that the dispute in the instant proceeding is not the dispute between McKee and G.C.S., except as derivative from the McJunkin claim for the price of pipe.

Nor are we impressed with the argument by McKee that the retention of the Third-Party Complaint threatens to bury the McJunkin purchase order claim among unrelated issues. To the contrary, as we held previously, the main suit between McKee and G.C.S. involved numerous claims and counterclaims arising out of a multi-million dollar construction contract. The McJunkin claim for the price of pipe is only one small portion of that contract, and in that regard it is especially noted that the instant proceeding involved the purchase order made even prior to the execution of the contract, which included the Forum Selection Clause. In considering all of the arguments made by McKee, it is still the judgment of this Court that the Motion for Severance of the Third-Party Complaint and the Amended Motion to Bifurcate and Stay the Third-Party Action must be denied.

The Alternative Motion to Transfer Entire Case to Illinois again raises the contention that the Third-Party Complaint of G.C.S. involves the same contract action now pending in Illinois, that this Court was therefore wrong in concluding G.C.S.'s claim against McKee in the instant proceeding depended entirely on the outcome of the McJunkin v. G.C.S. claim and was thus dependent on the resolution of the primary matter, citing *Chapin & Chapin v. McShane Contracting Co., Inc.* 374 F.Supp. 1191 (W.D. Pa. 1974). McKee's Motion does not meet this issue, but simply argues that the Illinois action involves G.C.S. and

McKee and, therefore, the entire matter should be transferred. Our previous Order points out the error of this argument, and the Alternative Motion will be denied.

An appropriate Order will be entered.

ORDER

AND NOW, to-wit, this 18th day of June, 1976, after due consideration of and argument on the Motions of the Third-Party Defendant, Arthur G. McKee & Company, and for the reasons set forth in the Opinion being filed simultaneously herewith,

IT IS ORDERED, ADJUDGED AND DECREED that the Motion for Reconsideration of Third-Party Defendant Arthur G. McKee's Motion To Sever and Transfer The Third-Party Complaint of G.C.S., Inc., the Alternative Motion To Transfer The Entire Case To Illinois, and the Amended Motion To Bifurcate And Stay The Third-Party Action be and the same are hereby denied.

/s/ *Daniel J. Snyder, Jr.*

United States District Judge



**APPENDIX 4**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

McJunkin Corporation,

*Plaintiff,*

v.

G.C.S., Inc., and I.S.C.
Inc.,

*Defendants*
*and Third-Party Plaintiffs,*

v.

Arthur G. McKee & Company,

*Third-Party Defendant.*

Civil Action No. 75-351

ORDER

Upon consideration of the motion by Third-Party Defendant Arthur G. McKee & Company to strike Third-Party Plaintiffs' Pretrial Narrative Statement and for Other Relief,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. McKee's Motion to Strike Third-Party Plaintiffs' Pretrial Narrative Statement is denied.

2. McKee's Motion to Reopen Discovery is denied.

3. McKee's Motion to Sever the Third-Party Action and to Transfer that action to the Northern District of Illi-

nois or alternatively to bifurcate and stay that action pending the resolution of the earlier filed related cases now pending in the Northern District of Illinois is denied.

4. McKee's Motion to Transfer this entire proceeding to the Northern District of Illinois is denied.

Dated: July 21, 1976

*/s/ Daniel J. Snyder, Jr.*

United States District Judge



**APPENDIX 5**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARTHUR G. MCKEE & COMPANY,
a Delaware corporation
registered to do business in
Illinois,

*Plaintiff,*

v.

G.C.S., INC., a Pennsylvania
corporation,

*Defendant.*

No. 75 C 1578

DECISION ON DEFENDANT'S
MOTION TO TRANSFER

Defendant has filed a motion to transfer this breach of contract case to the Western District of Pennsylvania pursuant to 28 U.S.C. §1404(a). Another suit i pending there against the defendant arising out of the same contract, and the plaintiff has been made a third-party defendant. That case apparently cannot be transferred here.

The contract provides in par. 36 of its General Terms and Conditions that the contractor (plaintiff) has the right to settle disputes "before a single forum selected by the Contractor", providing that the sub-contractor has a "reasonable" opportunity to be represented and heard. This provision was included in the plaintiff's Bid Inquiry and was never objected to by either party during negotiations extending over approximately four months although

the provision was eliminated by agreement with at least one sub-contractor. Therefore, under *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the principal question is whether enforcement of the clause is reasonable in this particular case.

In *Bremen,* the court said at 407 U.S. p. 15, 18:

> . . . in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside. . . . The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.
>
> • • •
>
> . . . it should be incumbent upon the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.

The defendant asserts that it would be unreasonable to require it to defend this suit here, not only because of the related case now pending in the Western District of Pennsylvania but also because most of the witnesses upon whom the defendant will rely are residents there. Defendant's affidavits state that 45 of its 46 essential witnesses reside in the Western District of Pennsylvania and that 20 of these are employed by persons who are not parties and are not subject to subpoena here. The evidence will concern a project which is located in that District. Defendant has also pointed out that the suit by a subcontractor in



the Western District of Pennsylvania to which the plaintiff is a defendant cannot be removed to this District and that other sub-contractors are not subject to suit here. None of these arguments would effectively deprive the defendant of its day in court, taking into consideration the frequency of voluntary appearances in this jurisdiction and the availability of video tape or written depositions. (407 U.S. at p. 19).

Plaintiff's affidavit shows that many of its witnesses live in the Northern District of Illinois and that at least eight of them are no longer under the control of the plaintiff. It has also shown that its records were to be returned to Chicago in September 1975, shortly after the project is completed. Furthermore, if the plaintiff should find its sub-contractors to be necessary parties, the principal ones are located in the Northern District of Illinois, including the plaintiff in the Pennsylvania suit.

The plaintiff ordinarily is entitled to choose its forum, in the absence of unfairness or compelling reasons to the contrary, and this right is fortified by the forum-selection clause of the contract. The plaintiff as an international construction firm has a valid reason for attempting to centralize its disputes in a single forum, and there is no evidence that this clause was negotiated unfairly or by means of undue influence or unequal bargaining power. Therefore, under the *Bremen* test, the inconvenience on the defendant does not rise to unfairness and is not sufficient to require transfer of this case to Pennsylvania. Any issues which are litigated or discovered in Pennsylvania between the parties hereto should not be re-litigated or rediscovered herein, however.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion of the defendant to transfer

is denied, and it is ordered to file a responsive pleading to the complaint within two weeks (14 days) hereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff's motion to strike the affidavit sent to the court by letter without leave is granted pursuant to Local Rule 12 and F.R.C.P. 7(b).

ENTER:

*/s/ Thomas R. McMillen*

Judge, U. S. District Court

DATED: Nov. 7, 1975



**APPENDIX 6**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

G.C.S., Inc.,

*Plaintiff,*

v.

Arthur G. McKee & Company,

*Defendant.*

Civil Action No. 75-604

ORDER OF COURT

The motion of Arthur G. McKee & Company to stay the above proceeding or, in the alternative, to transfer said action to the Northern District of Illinois, Eastern Division, having come on for argument before the Court on Friday, February 20, 1976, and the Court having heard counsel for both parties and having considered the matters set forth in said motion and in the Exhibits attached thereto, as well as the matters contained in the Answer and Supplemental Answer of G.C.S., Inc. to said motion and in the affidavit of William C. Bergmark and Exhibits attached thereto filed with said Supplemental Answer, as well as the matters submitted by the parties to the Court in their respective memoranda in support of and in opposition to said motion, including the documents attached as Exhibits to said memoranda, the Court finds and concludes as follows:

1. On May 16, 1975, Arthur G. McKee & Company ("McKee") and G.C.S., Inc. ("GCS") each filed suits against

the other, McKee filing as Plaintiff against GCS in an action commenced in the United States District Court for the Northern District of Illinois, Eastern Division, at No. 75-C-1578 and GCS filing as Plaintiff against McKee in an action commenced in the United States District Court for the Western District of Pennsylvania at No. 75-604. The claims asserted by the Plaintiff in each of these actions arise out of the same transactions or occurrence, that is, a subcontract awarded by McKee to GCS under which GCS was to furnish certain materials, labor and equipment incident to certain piping and equipment installation work being performed by McKee as General Contractor at the Clairton Works of the United States Steel Corporation in Clairton, Pennsylvania.

2. On June 2, 1975, McKee filed a motion in this action in which it asked, for reasons set forth in said motion, that this action be stayed pending all proceedings in the Illinois action which McKee had commenced against GCS or, in the alternative, that this action be transferred to the United States District Court for the Northern District of Illinois, Eastern Division, so that it could be consolidated with the earlier filed action pending there.

3. On June 6, 1975, GCS moved in the Illinois action for a transfer of that action to the Western District of Pennsylvania so that the Illinois action could be consolidated with the within action.

4. At that time, McKee withdrew its pending motion and, on July 2, 1975, filed an Answer to Plaintiff's Complaint. In the Second Defense of said Answer, McKee preserved and reiterated its objections to venue and the other grounds upon which it had based its earlier motion for stay or transfer. In addition, McKee raised the objection that the claims asserted in this action by GCS, should



have been asserted by GCS as a Counterclaim in the Illinois action, by reason of FRCP 13(a).

5. Thereafter, both GCS and McKee filed extensive factual affidavits and briefs in the Illinois action with respect to the issues raised in that Court by GCS's Motion to Transfer that case to this Court. Virtually all, if not all, of said materials have been submitted to this Court for its consideration in connection with McKee's Motion to Stay or to Transfer these proceedings.

6. On November 7, 1975, the Honorable Thomas R. McMillen entered an Order in the Illinois action denying GCS's Motion to Transfer. In his decision, Judge McMillen stated, *inter alia,:*

> "The defendant . . . [GCS] . . . asserts that it would be unreasonable to require it to defend this suit here, not only because of the related case now pending in the Western District of Pennsylvania but also because most of the witnesses upon whom the defendant will rely are residents there. Defendant's affidavits state that 45 of its 46 essential witnesses reside in the Western District of Pennsylvania and that 20 of these are employed by persons who are not parties and are not subject to subpoena here. The evidence will concern a project which is located in that District. Defendant has also pointed out that the suit by a subcontractor in the Western District of Pennsylvania to which the plaintiff . . . [McKee] . . . is a defendant cannot be removed to this District and that other subcontractors are not subject to suit here. None of these arguments would effectively deprive the defendant of its day in court, taking into consideration the frequency of voluntary appearances in this jurisdiction

and the availability of video tape or written depositions. (407 U.S. at p. 19).

"Plaintiff's . . . [McKee] . . . affidavit shows that many of its witnesses live in the Northern District of Illinois and that at least eight of them are no longer under the control of the plaintiff. It has also shown that its records were to be returned to Chicago in September 1975, shortly after the project is completed. Furthermore, if the plaintiff should find its sub-contractors to be necessary parties, the principal ones are located in the Northern District of Illinois, including the plaintiff in the Pennsylvania suit.

"The plaintiff ordinarily is entitled to choose its forum, in the absence of unfairness or compelling reasons to the contrary, and this right is fortified by the forum-selection clause of the contract. . . ."

7. On the basis of his findings and conclusions, Judge McMillen, on November 7, 1975, entered an Order denying GCS's Motion to Transfer the Illinois action to the Western District of Pennsylvania.

8. On December 2, 1975, McKee filed its Motion to Stay or Transfer this action to Illinois. In said motion, McKee alleged among other grounds, that principles of comity and judicial economy mandated that this Court should not re-litigate the issues which GCS had voluntarily submitted to Judge McMillen for decision in the action pending in the Northern District of Illinois.

9. On January 8, 1976, GCS filed an Answer to said motion in which it asserted, among other things, that the motion was premature for the reason that GCS was going to seek re-consideration of Judge McMillen's Order. In said Answer and in a Supplemental Answer filed on January 16, 1976, GCS set forth at length the matters on which



it was to seek re-consideration in the Illinois Court and again asked that this Court hold McKee's motion in abeyance in order to permit appropriate documents to be filed with the United States District Court for the Northern District of Illinois.

10. On January 28, 1976, after such additional documents had been submitted to the Illinois Court, Judge McMillen denied GCS's Motion for Reconsideration. Referring to the principal ground on which GCS sought such relief, namely, GCS's newly stated claim that the forum-selection provision invoked by McKee had not been agreed to by GCS, Judge McMillen determined that he did not find it necessary for him to resolve this dispute, stating:

> ". . . the facts wouldn't change any. The question is whether this is the more convenient forum, and I decided that McKee had a right to try the case in Chicago where its principal office is, and where a number of its witnesses are, and a number of the subcontractors are, and whether or not this was in the contract doesn't affect that."

11. In the circumstances here presented, Rules of comity and orderly judicial administration make it inappropriate for this Court to reconsider the matters which GCS has already submitted to Judge McMillen and to reach a different result.

For the reasons stated above, it is Ordered that this action be transferred to the Northern District of Illinois, Eastern Division, where it may be consolidated with the action now pending at No. 75-C-1578.

March 19, 1976

*/s/ Herbert P. Sorg*
Chief District Judge

## APPENDIX 7

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

HONEYWELL, INC.,

*Plaintiff,*

vs.

G.C.S., INC., I.S.C., INC.,
and TRAVELERS INDEMNITY CO.,

*Defendants,*

and

ARTHUR G. McKEE & COMPANY,

*Additional Defendant.*

No. GD 75-17913

OPINION

WATSON, J.

This matter comes before the Court upon the petition of the Additional Defendant, Arthur G. McKee & Company, for the entry of an order either dismissing, staying, or severing and staying the Original Defendants' Complaint against McKee.

The present case is part of a complex set of law suits involving numerous claims and counterclaims arising out of a multi-million dollar construction project at an Ammonia and Sludge Removal Facility for the United States Steel Corporation at Clairton, Pennsylvania. Apparently McKee and G.C.S. contracted for the installation of certain piping at the aforementioned U.S. Steel facility. Contractual problems arose and many suits were filed with the present and other parties in the Northern District of Illinois, and the Western District of Pennsylvania and the Common Pleas Court of Allegheny County.



McKee has argued, in support of its present petition, that this Court is not the appropriate forum in which to have a determination made of the claims included in the complaint, and that the assertion of such claims by the original defendants is contrary to and inconsistent with the provisions of the basic contract on which such claims are grounded. The original defendants have vigorously opposed the petition to dismiss, stay or sever and stay.

Specifically, McKee contends that the forum selection clause (clause #36, entitled "Disputes") in the contract between G.C.S. and McKee gives McKee the option to select a single forum for the resolution of all disputes under the contract between G.C.S. and McKee. McKee has filed suit against G.C.S. in the Northern District of Illinois and contends that that should be the forum for the decision of all claims between the parties.

The Court's attention is drawn to a case in which the present petitioner, McKee, raised the identical argument for severance and stay as it is presently arguing before this Court. In *McJunkin Corporation* v. *G.C.S., Inc.* v. *Arthur G. McKee & Company* at Civil Action No. 75-351 (W.D. Pa.), Judge Snyder refused McKee's petition and found that the forum selection clause did not apply to actions brought by third parties (as Honeywell is in the present case); and that there can be no compulsory counterclaim on the part of G.C.S. unless and until the third party claim has been finally litigated.

Logic dictates that all matters between Honeywell, G.C.S. and McKee be settled in one action. The rights and

liabilities of all parties determined together, in the same manner that they will be in *McJunkin, supra.* McKee has cited a case which is clearly distinguishable from the instant case, *G.S.C., Inc.* v. *McKee,* Civil Action No. 75-604 (W.D. Pa.). Therein, the Western District Court (per Sorg, J.), applying principles of comity, transferred G.C.S.'s action to the Northern District of Illinois in accord with that District's ruling in *McKee* v. *G.C.S.* In *McKee* v. *G.C.S.,* the Court used the forum selection clause to permit McKee to select Illinois as the forum to decide issues pending between the parties. The salient distinguishing feature of *McKee* v. *G.C.S.* from *Honeywell* v. *G.C.S.* v. *McKee* is that Honeywell is a third party action, as was pointed out above in relation to McJunkin, supra, and that type of action is not controlled by a forum selection clause in a contract wherein Honeywell was not a party.

Therefore, the following:

ORDER OF COURT

AND NOW, to wit, this 4 day of June, 1976 IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Additional Defendant's Petition for Severance, Dismissed, Stayed or Other Relief be, and the same hereby is, denied.

Case to proceed *sec leg sec reg.*

BY THE COURT

*/s/ Watson, J.*